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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-5401

STEVE MENNA,

Petitioner,

-v-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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PRELIMINARY STATEMENT

Petitioner seeks a writ of certiorari to review the judgment of the the New York Court of Appeals entered June 11, 1975, which affirmed an order of the Appellate Division, Second Department, rendered the 29th of July, 1974, affirming the judgment of the Supreme Court, Kings County rendered the 11th of April, 1972, convicting petitioner of the crime of Criminal Contempt and sentencing him thereon to a conditional discharge (Corso, J., at plea and sentence).

OPINIONS BELOW

The opinion of the New York Court of Appeals has not been officially reported.

The order and memorandum of affirmance of the Appellate Division, Second Department, is reported at 45 A D 2d 1038 and 358 N.Y.S. 2d 927 (1974).

No opinion was written by the Supreme Court, Kings County.

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether petitioner's counseled plea of guilty to the crime of Criminal Contempt, entered after the denial of his motion to dismiss the indictment on the ground that he had been twice placed in jeopardy, constituted a waiver of the defense of double jeoprdy.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments V and XIV.

STATEMENT OF THE CASE

On the 7th of November, 1968, Steve Monna, petitioner herein, was summoned by the Fourth Additional Kings County Grand Jury, impaneled in May, 1968, to testify as part of a comprehensive investigation into a conspiracy to commit murder and other crimes in the County of Kings in connection with an effort by unnamed persons to succeed one Joseph Bonanno as head of an organized crime syndicate. Petitioner refused to answer the District Attorney's questions, notwithstanding the Grand Jury's grant of immunity.

On the 18th of March, 1969, petitioner was directed by Hon. Miles McDonald, Justice of the Supreme Court, Kings County, to return to the Grand Jury to testify. Upon returning, he again refused to answer questions similar to those previously asked by the District Attorney. Petitioner was adjudicated in contempt of court pursuant to Judiciary Law §750 and served a thirty-day sentence after he declined an opportunity to purge his contempt.

Petitioner was thereafter accused by Kings County Indictment No. 1063/1970 of the crime of Criminal Contempt for his refusal to testify on the 7th of November, 1968. On the 11th of April, 1972, defense counsel made an oral application before Hon. Joseph R. Corso, Justice of the Supreme Court, Kings County, to dismiss

the indictment pursuant to New York Criminal Procedure Law Article 40 ". . . on the grounds that there has been former jeopardy in this case . . ." (sic). The motion was denied, whereupon petitioner pled guilty to the indictment and was sentenced to a conditional discharge.

Subsequently, petitioner appealed to the Appellate Division, Second Department, claiming that his indictment for Criminal Contempt, after he had been punished for civil contempt pursuant to Judiciary Law §750, had twice placed him in jeopardy. The basis for this contention was found in People v. Colombo, 31 N Y 2d 947, 341 N.Y.S. 2d 97, 293 N.E. 2d 247 (1972), decided approximately eight and one-half months after petitioner's plea and sentence. The Appellate Division affirmed petitioner's conviction, citing People v. LaRuffa, 40 A D 2d 1022, 338 N.Y.S. 2d 957 (2d Dept. 1972), aff'd, 34 N Y 2d 242, 356 N.Y.S. 2d 849, 313 N.E. 2d 332 (1974), rearg. den., 34 N Y 2d 916 (1974).

Leave to appeal to the Court of Appeals was granted by Hon. Charles A. Breitel, Chief Judge, on the 27th of November, 1974, after this Court vacated and remanded LaRuffa, (419 U.S. 959 [1974]) for reconsideration in light of Blackledge v. Perry, 417 U.S. 21 (1974) and Tollett v. Henderson, 411 U.S. 258 (1973). Chief Judge Breitel granted this application on the condition that the Monna and LaRuffa cases be argued together.

On the 11th of June, 1975, the Court of Appeals affirmed petitioner's conviction and held that "[h]aving knowingly and voluntarily chosen to plead guilty after denial of his motion to dismiss the indictment on the ground of double jeopardy, the [petitioner] waived his right later to raise the defense and remains bound by his plea. (See People v. LaRuffa, decided herewith.)." Fuchsberg and Wachtler, JJ., dissented.

Petitioner now seeks a writ of certiorari to review that decision.

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PETITIONER'S DEFENSE OF DOUBLE JEOPARDY WAS WAIVED BY HIS COUNSELED PLEA OF GUILTY.

In affirming petitioner's conviction for Criminal Contempt on the authority of People v. LaRuffa, 37 N Y 2d 58, 371 N.Y.S. 2d 434 (1975), decided the same day, the Court of Appeals limited the scope of this Court's holding in Blackledge v. Perry, 417 U.S. 21 (1974), to its unique facts and correctly held that petitioner's counseled plea of guilty constituted a waiver of his double jeopardy defense. Accordingly, this petition for a writ of certiorari should be denied.

A close examination of Blackledge, supra, will reveal the inherent weaknesses in petitioner's assertion (see, Petitioner's Brief at 4-5) that the Court of Appeals ". . . erroneously minimized the distinction drawn in Blackledge between antecedent constitutional violations and those which go to the very power of the State to bring a defendant into court to answer charges for which he had already been placed in jeopardy." The appropriate constitutional distinction between Blackledge and the case at bar will also be revealed.

Two issues were presented in Blackledge, supra, namely: whether respondent Perry's due process or double jeopardy rights were violated by North Carolina's two-tiered appellate process: and whether respondent had waived those claims by his plea of guilty (417 U.S. at 24-25, 28-29).

In granting federal habeas corpus relief to respondent, this Court expressly declined to consider the merits of the double jeopardy claim (417 U.S. at 25, 31),* and held that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him at the trial de novo (417 U.S. at 28-29). Such response ". . . operated to deprive [respondent] due process of law . . ." (417 U.S. at 30-31). This Court also held that a plea of guilty does not waive constitutional claims which challenge the very power of the State to bring a defendant into court to answer the charge[s] against him, as opposed to those claims relating to violations of constitutional rights antecedent to the entry of the plea (417 U.S. at 30).

At the core of this purely due process holding is this Court's narrow concern with actual or potential state vindictiveness and prosecutorial retaliation against an accused who has exercised a statutorily conferred right. (See, also, North Carolina v. Pearce, 395 U.S. 711 [1969].) The issue is the legitimacy of purpose of the State or prosecution at the inception of the criminal proceeding which, in the last analysis, challenges the court's jurisdiction to conduct those proceedings.

* Indeed, the double jeopardy claim was not available to respondent Perry (see 417 U.S. at 32 [Rehnquist, J., dissenting]).

[1] New York Criminal Procedure Law §40.20(2) (McKinney 1971), and Ohio v. Thomas, 397 U.S. 436, 448 (1970) (Brennan, J., concurring).

Further, since a plea of guilty does not waive jurisdictional defects, Perry's claim was preserved for appellate review (see, e.g., United States ex rel. Glenn v. McMann, 349 F. 2d 1018 [2d Cir. 1965]; Mahler v. United States, 333 F. 2d 472 [10th Cir. 1964], cert. den., 379 U.S. 993 [1965]; and United States v. Hetherington, 279 F. 2d 792 [7th Cir. 1960], cert. den. 364 U.S. 908 [1960]).

In the case at bar, there is no evidence, nor does petitioner argue to the contrary, that his indictment was the product of State vindictiveness or prosecutorial retaliation. To be sure, he was not punished for the exercise of a lawful right nor was the fear of punishment instilled in him for that reason. Rather, petitioner was legitimately indicted for violating State law as it then existed after he declined an offer to purge his contempt.*

Under these circumstances, it cannot be seriously argued that petitioner's indictment, after he was found in contempt of court by Mr. Justice McDonald, ". . . operated to deny [petitioner] due

* The law in New York underwent modification after petitioner pled guilty to the indictment (see, supra at 4). Only subsequent to petitioner's plea did the courts of New York State construe orders of contempt identical to that holding petitioner in contempt violative of the Double Jeopardy Clause. (See, e.g., Matter of Capio v. Justices of the Supreme Court, 41 A D 2d 235, 342 N.Y.S. 2d 100 [2d Dept. 1973], aff'd 34 N Y 2d 603, 354 N.Y.S. 2d 953, 310 N.E. 2d 547 [1974]; and People v. Matra, 42 A D 2d 865, 346 N.Y.S. 2d 872 [2d Dept. 1973].) A plea, otherwise voluntarily and intelligently entered, is not assailable because of subsequent changes in the law. (See, e.g., Brady v. United States, 397 U.S. 742, 757 [1970]; and McMann v. Richardson, 397 U.S. 759, 773 [1974].)

process of law . . ." (417 U.S. at 30-31). To be sure, "[n]ot all cases of double jeopardy, so called, so offend our concept of ordered liberty as to constitute a lack of due process of law . . ." (United States ex rel. Stevens v. Wilkins, 287 F. 2d 865, 868 [2d Cir. 1961], cert. den., 368 U.S. 853 [1961]. See Hoag v. New Jersey, 356 U.S. 468 [1958]).*

Respondents submit, therefore, that the State's purpose in indicting petitioner was, ab initio, legitimate; a State has the absolute right to prosecute a violator of the law notwithstanding the existence of a defense, e.g., double jeopardy, which, if affirmatively raised, may later bar that action. As such, a double jeopardy claim does not challenge the power of the State to initiate the criminal proceedings, but, rather, to maintain them.**

In short, Blackledge simply does not overrule the long line of decisions of the manifold jurisdictions which state that,

> "[t]he right not to be placed in jeopardy twice for the same offense is a personal right. It is an immunity to the citizens by our Constitution and may be waived. The plea of guilty by the defendant constitutes a waiver of this right." (Caballero v. Hudspeth, 114 F. 2d 545, 547 [10th Cir. 1940].)

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* See generally 16 A C.J.S. Constitutional Law §582 (1956) (citing cases).

** Similarly, the statute of limitations precludes the State from maintaining, as opposed to initiating, the criminal action if timely raised.

See, also, Cox v. State of Kansas, 456 F. 2d 1279 (10th Cir. 1972); Kistner v. United States, 332 F. 2d 978 (8th Cir. 1964); United States v. Hoyland, 264 F. 2d 346 (7th Cir. 1959), cert. den., 361 U.S. 845 (1959); Berg v. United States, 176 F. 2d 122 (9th Cir. 1949), cert. den. 338 U.S. 876 (1949); People v. Lynch, 40 A D 2d 856, 857 (2d Dept. 1972), and People ex rel. Williams v. Follette, 30 A D 2d 693 (2d Dept. 1968), aff'd, 24 N Y 2d 949 (1969). Cf. Biddinger v. Commissioner of Police of the City of New York, 245 U.S. 128, 135 (1971); Kepner v. United States, 195 U.S. 100, 131 (1904); United States v. Young, 503 F. 2d 1072, 1074 (2d Cir. 1974); United States v. Conley, 503 F. 2d 520, 521 (8th Cir. 1974); United States v. Scott, 464 F. 2d 832, 833 (D.C. Cir. 1972); United States v. Buonomo, 441 F. 2d 922 (7th Cir. 1970), cert. den., 404 U.S. 845 (1971); Grogan v. United States, 394 F. 2d 287 (5th Cir. 1967), cert. den., 393 U.S. 830 (1968); Kistner v. United States, supra; and People v. Cignarale, 110 N Y 23, 29 (1888).

Petitioner's reliance on Robinson v. Neil, 409 U.S. 505 (1973), as the LaRuffa majority correctly concluded, is misplaced. Robinson was solely concerned with the retroactivity of Waller v. Florida, 397 U.S. 387 (1970); the question of whether Robinson's plea of guilty waived the defense of double jeopardy was not litigated. Significantly, Robinson was followed by this Court's decision in Tollett v. Henderson, 411 U.S. 258 (1973), which reaffirmed the principle of

the so-called "Brady trilogy"*, concerning the legal consequence of pleading guilty (411 U.S. at 267). The major problem, however, which we perceive in petitioner's equation of double jeopardy and due process via the ". . . practical result[s]. . ." language found in Blackledge (417 U.S. at 31), also embraced by the dissenters in the Menna case, is the failure to account for the manner in which the results are effected. Blackledge has taught us that no legal formula is necessary to trigger and preserve a due process challenge; the law of the manifold jurisdictions, however, indicates that double jeopardy itself possesses no such talismanic powers.

Petitioner's reference to Mr. Justice Rehnquist's dissent in which he noted that Blackledge ". . . surely sounds in the language of double jeopardy, however it may be dressed in due process garb . . ." (417 U.S. at 35), is more significant for what petitioner has omitted than for what he has cited because Mr. Justice Rehnquist went on to say that,

> "I do not see why a constitutional claim the consequences of which make it the identical twin of double jeopardy may not, like double jeopardy, be waived by the person for whose benefit it is accorded." (417 U.S. at 35.)

Lastly, petitioner complains, at page 5 of his brief, that it is fundamentally unfair to require him to ". . . subject himself

* Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); and Parker v. North Carolina, 397 U.S. 790 (1970).

to a trial . . ." to ". . . preserve his double jeopardy claim . . .". The short answer to this complaint is that petitioner could have fully litigated this issue without going to trial by initiating a proceeding pursuant to Article 78 of the New York C.P.L.R. (see, e.g., Matter of State of New York v. King, 36 N Y 2d 59, 64, 364 N.Y.S. 2d 879, 883, 324 N.E. 2d 351, 354-355 [1975]).

Respondents therefore respectfully submit that, because the New York Court of Appeals correctly held that petitioner's counseled plea of guilty constituted a waiver of the defense of double jeopardy, and further, that the plea met the criteria articulated in Tollett v. Henderson, supra (People v. LaRuffa, 37 N Y 2d at p. 61, 37 N.Y.S. 2d at p. 436), petitioner's judgment of conviction was properly affirmed.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Brooklyn, New York
October, 1975

Respectfully submitted,

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